No. 74-1584

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

ANNE H. HAMPTON, INDIVIDUALLY, AND AS EXECUTRIX OF THE ESTATE OF FREDERICK JORDAN HAMPTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The sole question presented by the petition is whether claims for refund of income taxes filed by petitioner, seeking to invoke the special tax relief under Section 692 of the Internal Revenue Code of 1954 for servicemen killed in a combat zone, were barred by the statute of limitations of Section 6511(a) of the Code.

The pertinent facts are as follows: Petitioner is the widow of Colonel Frederick Hampton, and the executrix of his estate. Colonel Hampton was a career Air Force officer who was killed in action in Vietnam. From April 1953 to October of that year, Colonel Hampton was assigned to active military duty in Korea, a designated combat zone. From October 1953 until November of 1967, he was assigned to various noncombat duties. On November 3, 1967, Colonel Hampton was again assigned to active combat duty in Vietnam, which had been classified a combat zone in 1964. He was killed in action on or about March 6, 1968 (Pet. App. A2).

Petitioner and Colonel Hampton filed joint federal income tax returns for 1963 and 1964 on April 15, 1964 and April 15, 1965, respectively, reporting tax liabilities of $2,468.17 and $2,928.00. The full amount of these liabilities was timely paid. On January 2, 1970, petitioner filed claims for refund of the taxes paid for 1963 and 1964 asserting that the tax liabilities for those years had been cancelled by Section 692 of the Code. The Internal Revenue Service disallowed the claims for refund as barred by the statute of limitations of Section 6511(a) of the Code. In this ensuing refund suit, the Court of Claims upheld the government's defense under the statute of limitations, and alternatively held that petitioner was not eligible for relief under Section 692 (Pet. App. A1-A19).

1. Section 6511(a) of the Code provides that a claim for refund of an overpayment of tax must be filed within three years from the date the return was filed or two years from the time the tax was paid, whichever period expires later. It is undisputed that the claims for refund at issue were not filed within the limitations period prescribed by that statute. Nevertheless, petitioner argues (Pet. 5-7) that because of the special nature of the relief accorded by Section 692 to servicemen killed in a combat zone, Congress could not have intended that that relief would be subject to the general statute of limitations provisions. Her position, however, is not only unsupported by any authority but is, as demonstrated by the Court of Claims (Pet. App. A5-A9), refuted by the legislative history of Section 692.

Section 692(1) provides that a serviceman who dies while serving in a combat zone shall not be subject to income taxes for the year of his death, or for any prior taxable year ending on or after the first day he so served in a combat zone after June 24, 1950. Although the effect of the statute is to cancel the serviceman's tax liability for those years, the statute by its terms does not authorize an automatic refund of taxes. Rather, if a deceased serviceman previously has paid taxes for any years covered by Section 692, the amounts so paid are treated as an overpayment. Treasury Regulations on Income Tax, Section 1.692-1(26 C.F.R.). Consequently, under the statutory scheme of the Code, no refund of such overpayment may be made by the Treasury or ordered by the courts unless a timely claim for refund is filed. See Secs. 6511(b)(1), 6532 and 7422(a) of the Code.

Contrary to petitioner's argument (Pet. 8), the fact that Section 692 authorizes relief with respect to taxable years as early as 1950 does not indicate that Congress intended to waive the limitations period in Section 6511. See *United States* v. *Zacks*, 375 U.S. 59. The legislative history of Section 692, and its predecessor provisions, shows that Congress was aware that the relief might be precluded in certain circumstances by the applicable statute of limitations.

In the Act of August 5, 1947, 61 Stat. 778, Congress amended the World War II predecessor of Section 692 (Section 421 of the Internal Revenue Code of 1939) to broaden its relief. As amended, Section 421 provided for the cancellation of tax liability in the case of a serviceman's death for all years after December 7, 1941, during which he was a member of the Armed Forces. Congress recognized that the statute of limitations might bar the retroactive relief otherwise authorized by the amended version of Section 421. It therefore enacted a special transitional period of limitations as Section 2 of the Act of August 5, 1947, in order to avoid that possibility. See H.R. Rep. No. 1006, 80th Cong., 1st Sess., p. 2 (1947).

However, when this tax forgiveness provision was reenacted at the beginning of the Korean War (Section 154 of the 1939 Code), Congress eliminated the special exception from the statute of limitations. And in reenacting Sec-

tion 154 as Section 692 of the 1954 Code, Congress provided no special limitations period. It thereby indicated that it intended the normal period of limitations to apply to claims under Section 692. Thus, there is no basis for disregarding the effect of the applicable statutes of limitations. *United States* v. *Zacks, supra.*

Finally, the recent amendment made to Section 692 by Section 4 of the Act of January 2, 1975, Pub.L. 93-597, 88 Stat. 1950, confirms that claims for refund predicated on Section 692 are subject to the limitations imposed by Section 6511. Section 4(c) of the Act, which is applicable to years ending on or after February 28, 1961, provides a special exception to the limitations period for filing claims for refund to make certain that relief authorized under Section 692 will not be lost as the result of a determination that a serviceman had died several years earlier but had been mistakenly classified as missing in action. As the Court of Claims noted below (Pet. App. A9), this provision would have been unnecessary if Congress did not consider the normal period of limitations to be applicable to refund claims under Section 692.[1]

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[1]There is no authority for petitioner's claim (Pet. 5-7) that the period of limitations should be construed as running from the date of the serviceman's death. The applicable statute of limitations under Section 6511 provides that the period begins to run from the time the return is filed or the tax is paid.

Petitioner alternatively contends (Pet. 7) that a refund of taxes under Section 692 is not subject at all to the restrictions imposed by Section 6511 but instead is governed by the six-year period of limitations provided in 28 U.S.C. 2401, the general statute of limitations for instituting civil actions against the United States. But Section 7422(a) of the Internal Revenue Code of 1954 prohibits the maintenance of any suit for the recovery of "*any sum* alleged to have been excessive or in *any manner* wrongfully collected" (emphasis supplied), unless a claim for refund has been duly filed. The doctrine of account stated, upon which petitioner relies, has no application to a suit for the recovery of taxes.

2. At all events, even if petitioner's claims for refund had been timely filed, she could not prevail in this action. As the Court of Claims observed, nothing in the legislative history of Section 692 indicates that Congress intended to extend the relief to years of noncombat service which intervene between separate years of combat duty. Here, it is undisputed that Colonel Hampton was engaged in noncombat service during the years in question. As the Court of Claims concluded, the legislative scheme reflected in Section 692 and the related provisions dealing with members of the Armed Forces, demonstrate that the statute was intended to cancel tax liability only for years of actual, continuous combat service. Thus, petitioner's claim does not qualify for the benefits accorded by Section 692.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1975.